

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: April 5, 2004

S.A.M.

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sun Ridge LLC¹ 584-1275-6733-5000
Cases 32-CE-77-1, 78-1, 79-1 584-5028
584-5042

These Section 8(e) cases were resubmitted for advice as to: (1) whether the entity that reaffirmed an allegedly unlawful project labor agreement within the Section 10(b) period was a single employer with the entity which had executed the agreement outside the 10(b) period; and, if so, (2) whether the single Employer violated Section 8(e) by executing the project labor agreement.

We agree with the Region that the relevant entities are a single employer and, therefore, that the charges are timely, and that the single Employer violated Section 8(e) by entering into the project labor agreement. The Region should argue that the agreement violates Section 8(e) because the Employer is not "in the construction industry," as it does not itself do construction work and has not been directly involved in any contracting for construction work, and because, even if the Employer had been "in the construction industry," the project labor agreement would nonetheless violate Section 8(e) under Connell Construction Co.,² because it was entered into outside the context of a collective-bargaining relationship and is not aimed at addressing problems raised by the relationships on a common situs jobsite.

FACTS

The charges in the instant cases concern the "Anatolia" residential and commercial development in Sacramento County, California, expected to eventually include at least 2,700 detached single-family dwellings and

¹ The charges also named the three Unions that were signatory to the project labor agreement at issue here. On May 19, 2003, the Region dismissed the allegations against the Unions.

² Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975).

commercial structures. On May 23, 2002, a project labor agreement entitled "AGREEMENT TO USE UNION LABOR FOR CONSTRUCTION OF THE ANATOLIA DEVELOPMENT" was executed by three Unions³ and Sun Ridge LLC, the entity named as the developer of Anatolia. Signing on behalf of Sun Ridge LLC was its Managing Member, AKT Development Corporation, by its Chairman, Angelo Tsakopoulos. The project labor agreement provided, inter alia, that Sun Ridge LLC would require any buyers of property within Anatolia to grant certain specified bidding preferences to Union contractors and subcontractors for any covered on-site construction work in the electrical, plumbing, and sheet metal trades.

In August 2002, an entity operating as Sun Ridge-Anatolia LLC began distributing brokers' packages for the sale of lots within Anatolia. The brokers' packages include the written requirement that the buyer comply with the bidding and other provisions of the project labor agreement.

On Friday, November 23, 2002, the Coalition for Fair Employment in Construction filed the charges in the instant cases alleging that Sun Ridge LLC and the charged Unions violated Section 8(e) by entering into the project labor agreement. The charges were not served on the Charged Parties until Monday, November 26, 2002. No conduct was alleged to violate Section 8(e) other than the execution of the project labor agreement and the brokers' packages' requirement that buyers comply with the project labor agreement, and the charges were not filed and served within six months of the date the project labor agreement was entered into on May 23, 2002. Therefore, the only conduct within the 10(b) period is the distribution by Sun Ridge-Anatolia LLC of the brokers' packages enforcing the project labor agreement.

[FOIA Exemption 5]⁴ [FOIA Exemption 5

³ U.A. Plumbers & Pipefitters Union, Local 447, IBEW Local 340, and Sheetmetal Workers Local 162.

⁴ [FOIA Exemption 5

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The Region's investigation adduced evidence showing that Sun Ridge LLC is owned by Angelo Tsakapoulos and members of his family, Lennar Sun Ridge LLC (an investment entity controlled by Lennar Communities, a builder/developer), and Sun Ridge-Anatolia Investors LLC (an investment entity controlled by Angelo Tsakapoulos). [*FOIA Exemption 5*

], Sun Ridge-Anatolia LLC is owned by several entities, including Sun Ridge-Anatolia Investors LLC (which, although not entirely clear, appears to be owned by entities and or individuals associated with Angelo Tsakapoulos), and Lennar Sun Ridge LLC. Sun Ridge LLC and Sun Ridge-Anatolia LLC are both managed on a day-to-day basis by AKT Development Corp., which is the "managing member" of Sun Ridge LLC and Sun Ridge-Anatolia Investors LLC, which is itself the "managing member" of Sun Ridge-Anatolia LLC. Large decisions for both Sun Ridge LLC and Sun Ridge-Anatolia LLC are made by both AKT Development Corp. (albeit through Sun Ridge-Anatolia Investors LLC for Sun Ridge-Anatolia LLC), and Lennar Sun Ridge LLC. Sun Ridge LLC initially bought and owns the Anatolia land -- its only business consists of selling large parcels of this land to Sun Ridge-Anatolia LLC, whose only business consists of buying Anatolia parcels from Sun Ridge LLC and selling them to builders for development. The two entities, which share the same office space, have no employees or labor relations other than a shared office staff.

Counsel for the Unions does not dispute the single employer status of Sun Ridge LLC and Sun Ridge-Anatolia LLC. Counsel instead argues that the Employer is an

⁵ See, e.g., Dan McKinney Co., 137 NLRB 649, 653-657 (1962); Ets-Hokin Corporation, Inc., 154 NLRB 839, 862 (1965), enfd. 405 F.2d 159 (9th Cir. 1968), cert. denied 395 U.S. 921 (1969).

⁶ See Plumbers, Local 447 (Malbaff Landscape Constr.), 172 NLRB 128, 129, 129 fn. 6 (1968); Edward Carey, et al., Trustees of UMW, 201 NLRB 368 (1973).

employer in the construction industry because the project labor agreement itself substantially controls the labor relations and employment terms and conditions of the construction employees who will ultimately build the housing units in the Anatolia project. If so, the project labor agreement would be protected by the construction industry proviso to Section 8(e). Counsel for the Unions also argues that that Connell does not require that a subcontracting agreement executed outside a collective-bargaining relationship cover all trades working on a common situs construction jobsite, and that these cases should be dismissed in any case because Section 8(e) has been held not to apply to the permanent sale of capital assets, such as the sale of a business or a portion thereof.

ACTION

We agree with the Region that the relevant entities are a single employer and, therefore, that the charges are timely, and that the single Employer violated Section 8(e) by entering into the project labor agreement. The Region should argue that the agreement violates Section 8(e) because the Employer is not "in the construction industry," as it does not itself do construction work and has not been directly involved in any contracting for construction work, and because, even if the Employer had been "in the construction industry," the project labor agreement would nonetheless violate Section 8(e) under Connell, because it was entered into outside the context of a collective-bargaining relationship and is not aimed at addressing problems raised by the relationships on a common situs jobsite.

1. Sun Ridge LLC and Sun Ridge-Anatolia LLC are a single Employer.

[FOIA Exemption 5

] we agree with the Region that the evidence is sufficient to demonstrate that Sun Ridge LLC and Sun Ridge-Anatolia LLC constitute a single Employer. Single employer status is based on four factors: common ownership; common management; interrelation of operations; and common or centralized control of labor relations.⁷ In the instant cases, it is clear that both Sun

⁷ See, e.g., Navigator Communications Systems, 331 NLRB 1056, 1061-1062 (2000); Three Sisters Sportswear Co., 312 NLRB 853, 861-863 (1993), enfd. mem. 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996).

Ridge LLC and Sun Ridge-Anatolia LLC are owned and managed by substantially the same parties, Angelo Tsakapoulos and his family, along with Lennar Sun Ridge LLC. They have wholly integrated operations -- Sun Ridge LLC solely sells land to Sun Ridge-Anatolia LLC, and Sun Ridge-Anatolia LLC solely buys this land from Sun Ridge LLC to sell to builders -- and both share office space and staff. Finally, they have no employees or labor relations other than a shared office staff. Thus, there is sufficient evidence to establish that Sun Ridge LLC and Sun Ridge-Anatolia LLC constitute a single Employer, and the Section 8(e) allegations in the charges in the instant cases are timely.⁸

2. The Employer is not "an employer in the construction industry" within the meaning of the proviso to Section 8(e).

The project labor agreement here, according job-bidding preferences to union signatory contractors, is an example of an agreement with a cease doing business object which is prohibited by Section 8(e), unless exempted by the construction industry proviso.⁹ The construction industry proviso to Section 8(e) exempts an agreement between a labor organization and "an employer in the construction industry" relating to the contracting or subcontracting of work to be performed at the construction site. The party asserting construction industry proviso protection bears the burden of proof.¹⁰ The Board has had few opportunities to address the applicability of the construction industry proviso to employers that are not traditional construction contractors. Those cases, discussed below, have found or not found such employers to be in the construction industry for 8(e) purposes based upon the employers' direct involvement with the contracting for the construction itself.

⁸ [FOIA Exemption 5

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⁹ See, e.g., National Woodwork Manufacturers Assn. v. NLRB, 386 U.S. 612, 629-30 (1967); Iron Workers Pacific Northwest Council (Hoffman Construction), 292 NLRB 562, 580 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990).

¹⁰ Carpenters Chicago Council (Polk Brothers), 275 NLRB 294, 296 (1985).

In Longs Drug,¹¹ an owner/operator of a chain of retail drugstores was found not to be "an employer in the construction industry" because its involvement in the construction of its drug stores was of "limited scope." The drugstore employer itself had entered into various agreements to use unionized labor, including an agreement with the Carpenters. As was its usual practice, the employer hired a general contractor to build a particular store. The employer also directly hired unionized carpenters to install fixtures at the end of the project. The employer did not select or contract with any of the subcontractors on the project, although it directly hired an architect who retained consulting engineers.

The general contractor, who was not signatory to any union agreements, subcontracted the electrical, sheet metal, drywall and taping, insulation, concrete and painting work to non-union subcontractors. The Carpenters union filed a grievance alleging that the general contractor's non-union subcontracts violated the union-signatory provision in the drugstore employer's bargaining agreement. The Carpenters and the employer argued for construction industry proviso protection on the ground that the employer was in the construction industry.

The ALJ noted that the requisite degree of control for invocation of the construction industry proviso could arise from the letting of subcontracts, or from regularly making decisions normally within the scope of a general contractor's duties, such as the selection of subcontractors. However, the ALJD, adopted by the Board, declined to find that the drugstore employer had exercised such control where it directly hired carpenters for "a very limited purpose during the final 14 days of an 8-month construction project."¹² Prior to that time, the employer had not become directly involved in the project's labor relations as it had only made "sporadic visits" to the jobsite to ensure that the work was "being performed in compliance with the plans and specifications."¹³

¹¹ Carpenters Local 743 (Longs Drug), 278 NLRB 440, 442 (1986).

¹² Ibid.

¹³ Ibid. See also Polk Brothers, 275 NLRB at 296-97 (employer that signed a union signatory subcontracting clause was not covered by the proviso as it was primarily a carpet retailer, not an installer as described by the SIC Manual; only 1% of its installation work was performed on construction sites and it only subcontracted installation work which could not be performed by its own employees).

The Board has, on occasion, found non-contractor employers to be covered by the construction industry proviso.¹⁴ That coverage, however, has always been based on the employers' direct involvement in their own construction contracting; that is, they acted like general contractors, who have always been recognized as being within the construction industry proviso's protection. We are aware of no cases in which an employer that does not itself do construction work, or has not been directly involved in contracting for construction work, has been found to be "in the construction industry" within the meaning of the construction industry proviso.

In the instant cases, it is undisputed that the Employer does not itself do construction work and has not been directly involved in any contracting for construction work. Therefore, we conclude that the Employer violated Section 8(e) by executing the reaffirmed project labor agreement because, like the employer in Longs Drug, it was not "in the construction industry" within the meaning of the construction industry proviso to Section 8(e).

We reject the contrary argument that the Employer is in the construction industry because the project labor agreement itself arguably controls some aspects of the labor relations and terms and conditions of employment of the construction employees. While the Board has articulated the test for construction industry proviso protection as the employer's degree of control over the construction-site labor relations,¹⁵ it has never evaluated the employer's degree of control over the construction-site labor relations in the abstract. Rather, the Board has

within a normal workweek); Columbus Building and Construction Trades Council (Kroger), 149 NLRB 1224, 1226, 1231-32 (1964) (unions violated Section 8(b)(4) in attempting to obtain union signatory subcontracting agreement with retail chain food store operator regarding construction by its landlords; store was merely a prospective lessee and not a construction industry employer, despite its own direct employment of unionized carpenters, sheet metal workers and truck drivers after the landlord had completed construction).

¹⁴ Los Angeles Building and Construction Trades Council (Church's Fried Chicken), 183 NLRB 1032, 1037 (1970); Carpenters (Rowley-Schlimgen), 318 NLRB 714 (1995).

¹⁵ See, e.g., Glens Falls Building & Construction Trades Council (Indeck Energy), 325 NLRB 1084, 1087 (1998).

always looked at whether the employer has itself retained and exercised control in the direct letting of construction subcontracts -- i.e., whether the employer has acted like a general contractor. This focus on the actual involvement of the employer in the construction contracting itself is fully consistent with the legislative history of the proviso, which explicitly discussed the coverage of general contractors; there is no mention of other, non-contractor employers being covered.¹⁶

Thus, while the contrary argument may be interesting and novel, the Board has never applied the proviso in this manner, and Congress did not so consider such application. In the absence of any precedent or guidance from the Board that it would find proviso protection for non-contractor employers merely because they enforce a project labor agreement, we conclude that the proviso provides no such protection. This conclusion is further supported by the Board's clear statements that: (1) consistent with established principles of statutory construction, the construction industry proviso should not be given an expansive reading, but should instead be read to exempt from 8(e)'s general prohibition against secondary agreements only those subjects expressly exempted by the proviso;¹⁷ (2) the legislative history of the construction

¹⁶ The statement of Senator Morse cited in Longs Drug, 278 NLRB at 442 ("a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a jobsite which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations. He lets those contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies. . . He is not innocent of any unfair labor policies on the part of a subcontractor"), as well as that of Senator Kennedy ("Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. . . The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them") must be understood in this light. Vol. II, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 1425, 1433 (emphasis added).

¹⁷ See, e.g., Operating Engineers Local 520 (Massman Construction Co.), 327 NLRB 1257, 1257-1258 (1999), citing Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023, 1029 (1993) and 2A Sutherland Stat. Const., Sec. 47.08 (4th ed. 1984).

industry proviso "indicates that Congress sought only to preserve the status quo and the pattern of collective bargaining in the construction industry at the time the legislation was passed" in 1959;¹⁸ and (3) as noted above, the party asserting construction industry proviso protection bears the burden of proof.¹⁹

Finally, we would not find construction employer status in the instant case based on the fact that the Employer here has consistently required application of the project labor agreement, unlike the employers in the Board cases cited above. This argument flies in the face of the Board's exclusive focus on the employer's direct involvement in the letting of subcontracts and relies upon a distinction that is not meaningful. Indeed, providing proviso protection to an employer that enforces a project labor agreement it executed, regardless of the employer's lack of actual involvement in the letting of subcontracts, while denying proviso protection to an employer that does not enforce its agreement, would make proviso protection for the execution of a project labor agreement depend on whether the employer subsequently enforces it or not. Therefore, for all these reasons, we conclude that the Employer here, like the employer in Longs Drug, is not "in the construction industry" within the meaning of the construction industry proviso to Section 8(e) and that the Employer violated Section 8(e) by executing and enforcing the project labor agreement.

3. The project labor agreement also violates Section 8(e) under *Connell*.

In Carpenters Local 944 (Woelke & Romero Framing),²⁰ the Board said that, under the Supreme Court's Connell decision,

the construction industry proviso permits subcontracting clauses . . . in the context of a collective-bargaining relationship and possibly even without such a relationship if the clauses are aimed at avoiding the Denver Building Trades problem.

¹⁸ See, e.g., Massman Construction Co., 327 NLRB at 1257, citing Alessio Construction, 310 NLRB at 1027.

¹⁹ Polk Brothers, 275 NLRB at 296.

²⁰ 239 NLRB 241, 250 (1978), *enfd.* 654 F.2d 1301 (9th Cir. 1979), *affd.* 456 U.S. 645 (1982).

While the Board has not clarified precisely what circumstances may justify a union signatory subcontracting clause negotiated outside the context of a collective-bargaining relationship, it has issued two decisions that provide guidance.

In Colorado Building & Construction Trades (Utilities Services),²¹ the employer was a non-union construction and maintenance firm which had its own construction employees but also used subcontractors from time to time. The union sought an agreement that would only cover the employer's subcontracting, while the employer itself remained non-union. The Board found the agreement, sought outside the context of a collective-bargaining relationship, to be unlawful under 8(e), because the agreement did not, "address [] problems posed by the common situs relationships on a particular jobsite or [] the reduction of friction between union and nonunion employees at a jobsite," because the agreement, inter alia:

d[id] not restrict the subcontracting of other types of work at the jobsite, . . . Thus, the clause allows for the possibility of union and nonunion employees working side by side at a jobsite.

In Ironmakers Pacific Northwest Council (Hoffman Electric),²² the employer, which formerly did construction work using its own employees under a collective-bargaining agreement with the Ironworkers union, decided that it would no longer employ ironworkers and other skilled trades directly, but would instead subcontract that work to other entities. The Ironworkers union thereafter sought to enter into an agreement with the employer that would require only that the employer subcontract its ironwork to union entities. The ALJ, affirmed by the Board, found that the agreement was sought outside the context of a collective-bargaining relationship and was unlawful under 8(e). In doing so, the decision quoted the above section from Utilities Services and added:

The Board's statement is directly applicable to the present case. . . . Furthermore, the two clauses allow for the possibility of union and nonunion employees working side by side at a

²¹ 239 NLRB 253, 256 (1978).

²² 292 NLRB at 580.

jobsite so they are not meant to reduce friction.

In the instant cases, it is undisputed that the project labor agreement was entered into outside of a collective-bargaining agreement. The agreement itself only addresses subcontracting; it does not cover the Employer itself in any way other than limiting its subcontracting. Indeed, as noted above, the Employer does not do any construction work itself or directly employ any employees in the covered trades, and there is no indication that it ever will. Thus, the relevant issue is whether the project labor agreement is justified by the second prong of Connell, i.e., avoiding the Denver Building Trades problem.

In this regard, it is significant that the agreement covers only electrical, plumbing, and sheet metal subcontractors; it permits the contracting of work to subcontractors employing carpenters, laborers, or any other trades without any restrictions or preferences based on the subcontractors' Union or non-Union status. Moreover, it allows for the possibility of at least some non-Union subcontracting even in the three covered trades, if there is a sufficient differential in subcontractors' bid prices. Thus, the agreement appears to be like those found unlawful in Utilities Services and Hoffman, as it "does not restrict the subcontracting of other types of work at the jobsite" and "allow[s] for the possibility of union and nonunion employees working side by side at a jobsite."²³ Therefore, we conclude that the project labor agreement in the instant cases violates Section 8(e) under Connell, regardless of whether the Employer is "in the construction industry," because the agreement was entered into outside the context of a collective-bargaining relationship and is not aimed at addressing problems raised by relationships on a common situs jobsite.

Counsel for the Unions argues that Connell does not require that a subcontracting agreement executed outside a

²³ In addition, the limited scope of the agreement properly distinguishes it from the one at issue in Indeck, which former Chairman Gould would have found lawful under Connell, because it "ensur[ed] an all-union workforce and thereby reduc[ed] the jobsite friction that may be caused when union and nonunion employees are required to work together." 325 NLRB at 1091 (Gould, concurring). This rationale suggests that a different result should obtain where, as here, the agreement does not ensure an all-union workforce, but rather only covers some of the building trades.

collective-bargaining relationship cover all trades working on a common situs construction jobsite, citing Carpenters Local Union No. 15 et al. (Metro Lathing & Plastering, Inc. et al).²⁴ In that case, the General Counsel argued that, under Connell, the construction industry proviso does not protect clauses limiting subcontracting of on-site work to employers signatory with a "particular union," but rather only protects clauses limiting subcontracting to employers who are signatory with any union. The ALJ, affirmed by the Board, stated that "the [construction industry proviso] exemption given by Congress surely cannot have been afforded only to different crafts working side by side at a construction project, but denied to a particular craft." Metro Lathing, however, involved the lawfulness of a clause in a full-blown collective-bargaining agreement. Metro Lathing did not involve a stand-alone subcontracting agreement, which can only be lawful if it is aimed at avoiding the Denver Building Trades problem.²⁵ Thus, the discussion cited by counsel solely addressed whether Connell prohibited a collective-bargaining agreement's subcontracting clause that required the employer to subcontract to firms with contracts with the union itself, to the exclusion of other unions. The ALJ's discussion has no applicability to analyzing a stand-alone subcontracting agreement and, in any event, does not outweigh the cases on point cited above. Therefore, we conclude that Connell requires a subcontracting agreement to be wall-to-wall and cover all trades working on the common situs jobsite in order to be lawful, and that the more limited project labor agreement at issue in the instant cases is unlawful on that basis.

4. Section 8(e) applies to these transactions.

Finally, Counsel for the Unions also argues that these cases should be dismissed because the "cease doing business" language in Section 8(e) has been held not to apply to the permanent sale of capital assets, such as the sale of a business or a portion thereof. Thus, Section 8(e) should not be applied to the sale of real estate at issue here. The Board has never dealt specifically with the issue of whether the sale of real estate property for development is "doing business" within the meaning of Section 8(e).

²⁴ 240 NLRB 255, 260-261 (1979).

²⁵ Associated Builders v. NLRB, 654 F.2d 1301, 1323 (9th Cir. 1981), *affd.* in relevant part 456 U.S. 645 (1982), also cited by Counsel for the Unions is inapplicable to the instant cases for the same reason.

The Board has considered several cases involving the sale of other capital assets, including oceangoing vessels,²⁶ and all or part of ongoing business enterprises.²⁷ In deciding these cases, the Board has considered two factors: (1) whether transaction at issue was merely part of an ongoing entity's business, or rather was the one-time transfer or sale of the business, i.e., the substitution of one owning entity for another; and (2) whether the alleged 8(e) agreement furthered the union's institutional interests or a rather furthered bona fide work preservation interest of existing employees. Where the Board has found the sale to be a fairly common occurrence in the "normal course of doing business" and no work preservation interest, as in Commerce Tankers and Seatrain Lines, it has applied Section 8(e). Where the Board has found a substitution of one employer for another and therefore a work preservation interest for the pre-existing employees, as in Cascade Employers and Harris Truck, the Board has found no "cease doing business" effect and has not applied Section 8(e).

In the instant cases, it is clear that the sale of land to builders is part of the "normal course" of the Employer's business. In fact, such land sales are all the Employer does. Moreover, the project labor agreement furthers only the Unions' interests, with no bona fide work preservation interests of pre-existing employees, as there are no pre-existing employees. Therefore, we conclude that Section 8(e) applies to the real estate transactions at issue here.

²⁶ National Maritime Union (Commerce Tankers Corp.), 196 NLRB 1100 (1972), enfd. 486 F.2d 907 (2d Cir. 1973), cert. denied 416 U.S. 970 (1974); Seatrain Lines, Inc., 220 NLRB 164, 171-173 (1975). We note that the Second Circuit in Commerce Tankers indicated that it "doubted" whether such a sale comes within the meaning of Section 8(e) but it "assumed without deciding for the future" that the Board was correct principally because the union there had not challenged the Board's decision on that ground. 486 F. 2d at 911.

²⁷ Operating Engineers, Local 701 (Cascade Employers' Assn., Inc.), 221 NLRB 751, 752 (1975); Harris Truck, 224 NLRB 100 (1976); Lone Star Steel Company, 231 NLRB 573 (1977), enfd. in relevant part 639 F.2d 545 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981); Amax Coal Company, 238 NLRB 1583, 1590, 1622-1624 (1978), rev. denied 614 F.2d 872 (3d Cir. 1980).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(e) by entering into the project labor agreement for the reasons set forth above.

B.J.K.